

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-0178-JLR

**PLAINTIFFS' CROSS-MOTION FOR
LIMITED EXPEDITED DISCOVERY ON
COMPLIANCE WITH PRELIMINARY
INJUNCTION**

NOTED FOR MARCH 2, 2018

JEWISH FAMILY SERVICE, et al.,

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

CASE NO. C17-1707-JLR

(RELATING TO CASE NO. C17-1707-JLR)

PLAINTIFFS' CROSS-MOTION FOR
DISCOVERY (No. 17-cv-1707-JLR)

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

INTRODUCTION

In moving to stay proceedings pending appeal in this case, Defendants contended that the Court should disregard Plaintiffs' efforts to proceed to discovery because Plaintiffs have not filed a motion with the Court (ECF No. 120, at 3).¹ Although Plaintiffs do not believe that a motion is necessary given that it is the Defendants who seek to stay the ordinary course of proceedings, including discovery,² Plaintiffs file this cross-motion in an abundance of caution. To the extent that this Court does not permit the proceedings to continue as proposed by Plaintiffs in response to Defendants' motion to stay proceedings, this cross-motion seeks limited expedited discovery on Defendants' compliance with this Court's preliminary injunction, including disclosure of the unredacted version of the January 29 agency memorandum that Defendants referenced in their recent court filing.

PROCEDURAL HISTORY

Defendants filed a motion to stay proceedings pending appeal on January 16, 2018 ("MSP", ECF No. 110). After filing that motion, Defendants filed a "Notice of Compliance with Preliminary Injunction" (ECF No. 114) on January 19 and a "Notice Following Conclusion of 90-day SAO Refugee Review" (ECF No. 119) on January 31. On February 1, Plaintiffs asked Defendants for a copy of the memorandum referenced in, but not attached to, the January 31 Notice. *See* Declaration of Melissa Keaney ¶ 2, Ex. A. Defendants produced a redacted copy of the memorandum a week later, on February 8. *See* Keaney Decl. ¶¶ 3-4, Ex. B-C. After reviewing the memorandum, Plaintiffs requested that Defendants reconsider the redaction and, if they refused, that they disclose the basis of the redaction. *See* Keaney Decl. ¶ 5, Ex. D. On

¹ All ECF citations are to *Doe v. Trump*, 2:17-cv-00178-JLR (W.D. Wash. Feb. 7, 2017), unless otherwise indicated.

² Although Defendants contend that this case is exempt from Rule 26(f) requirements, Plaintiffs' case is not limited to APA claims, *see* Complaint ¶¶ 199-201 (ECF No. 1), and Defendants did not raise this argument as a ground for refusing to confer with Plaintiffs, *see* Hirose Decl., Exs. B, D, F, I (ECF No. 117).

February 13, Defendants refused to reconsider the redaction and argued that the redacted content was subject to the law enforcement privilege. *See* Keaney Decl. ¶ 6, Ex. E.

In the interim, Defendants filed a motion to dismiss their appeal in the Ninth Circuit, seeking to vacate this Court’s preliminary injunction as moot. Plaintiffs intend to oppose the motion and seek a remand to take discovery on mootness, which will largely overlap with the compliance discovery proposed in this motion.³

ARGUMENT

Plaintiffs ask the Court to order limited expedited discovery on Defendants’ compliance with the preliminary injunction even if the Court decides that a stay of proceedings is appropriate pending the disposition of the cross-appeals. The Court may order expedited discovery before the Rule 26(f) conference where, as here, Plaintiffs have shown “good cause.” *See Nat’l Products Inc. v. Does 1-4*, No. C16-0702JLR, 2016 WL 2989971, at *2 (W.D. Wash. May 23, 2016) (Robart, J.); *see also Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002) (adopting the “good cause” standard for expedited discovery). In addition, where “significant questions regarding noncompliance have been raised,” the Ninth Circuit has stated that “appropriate discovery should be granted.” *Cal. Dep’t of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1034 (9th Cir. 2008) (reversing district court’s denial of motion to enforce judgment with instructions to address plaintiff’s request to authorize discovery regarding compliance with injunction and suggesting that plaintiff “appear[ed] to have a strong case for further discovery”). In *Leavitt*, the Ninth Circuit instructed that “a district court should give careful attention to a request for discovery to establish noncompliance with one of its judgments,” *id.* at 1033, and that “the kind and amount of evidence of noncompliance required to justify discovery is, necessarily, considerably less than that needed to show actual noncompliance,” *id.* at 1034; *see also Nat’l*

³ Although Plaintiffs understand that the Court may choose to wait to rule on this motion until the Ninth Circuit has decided the motion to dismiss, Plaintiffs file this motion now because of the irreparable harm to Plaintiffs should the Defendants be out of compliance with the injunction and to avoid any delay in opening discovery if the Ninth Circuit remands the case for a factual finding on mootness.

1 *Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127,
 2 130-31 (D.D.C. 2012) (ordering discovery on compliance in an APA case under the federal
 3 court's "broad discretion in using its inherent equitable powers to ensure compliance with its
 4 orders").⁴

5 The record in this case raises sufficiently significant questions regarding compliance to
 6 establish good cause for proceeding with limited discovery. As explained in Plaintiffs'
 7 opposition to the MSP, Defendants effectively conceded that they were not complying with the
 8 injunction in their prior motion for a stay (ECF No. 95) and Defendants' notice of compliance
 9 filing on January 19 (ECF No. 114) did nothing to assuage concerns about compliance, instead
 10 raising a host of additional questions. *See* Opp. to MSP at 5-9 (ECF No. 115).

11 Defendants' additional notice filed on January 31 similarly failed to include any concrete
 12 information about what Defendants are now doing, instead referencing and summarizing,
 13 without attaching, a January 29 memorandum that purportedly outlined "additional security
 14 enhancements and recommendations to strengthen the integrity of the U.S. Refugee Admissions
 15 Program (USRAP)." Def.'s Notice Following Conclusion of 90-Day SAO Refugee Review at 1
 16 (ECF No. 119). Although the Defendants have now produced this memorandum to Plaintiffs,
 17 the memorandum itself fails to provide any concrete information about these enhancements and
 18 recommendations, instead referencing additional guidelines and training that could simply be a
 19 continuation of the suspension prohibited by the preliminary injunction. *See* Keaney Decl. ¶ 4,
 20 Ex. C at 2-3; *Washington v. Trump*, No. C17-0141JLR, 2017 WL 1045950, at *3 (W.D. Wash.
 21 Mar. 16, 2017) (Robart, J.) ("Obviously, Defendants could not simply reissue EO1 under a new
 22 name and number and implement it without violating the court's preliminary injunction.").
 23 Defendants' assertion in the January 31 notice that they "do not understand the preliminary
 24

25 ⁴ In *National Law Ctr.*, the court granted the plaintiffs' request for limited discovery to "facilitate its
 26 evaluation of the defendants' motion to vacate" the injunction without engaging in good cause analysis, instead
 relying on its own discretion. 842 F. Supp.2d at 131.

1 injunction that is currently in place in this case to prohibit Defendants from implementing these
 2 enhancements and recommendations” is entirely conclusory—neither this Court nor Plaintiffs
 3 can assess the validity of that assertion without further information, including disclosure of the
 4 additional guidelines and training mentioned in the memorandum.⁵ *See* (ECF No. 31 at 1-2); *cf.*
 5 *National Law Ctr.*, 842 F.Supp.2d at 131 (“Equity would not be achieved if a court decided
 6 simply to rubber-stamp an enjoined party’s unsupported self-assessment of its compliance with a
 7 court order.”).

8 The Court should grant Plaintiffs’ motion given these concerns about compliance with
 9 this Court’s injunction, the irreparable harm Plaintiffs suffer if Defendants are not complying
 10 with the injunction,⁶ *see* Order Issuing a Prelim. Inj. at 56-58 (ECF No. 92), as well as
 11 considerations relating to the administration of justice and lack of any prejudice to Defendants,
 12 *see* Opp. to MSP at 5, 9-12 (ECF No. 115). *Semitoil*, 208 F.R.D. at 276 (“Good cause may be
 13 found where the need for expedited discovery, in consideration of the administration of justice,
 14 outweighs the prejudice to the responding party.”). Specifically, Plaintiffs request that the Court
 15 order Defendants to answer Plaintiffs’ document requests, which Plaintiffs will serve
 16 immediately after this Court grants this motion, within two weeks of service. *See* Fed. R. Civ. P.
 17 34(b)(2)(A) (permitting Court to order a specific time to respond to document requests).
 18 Plaintiffs’ document requests will be limited to the following categories of documents:

- 19 • Documents relating to the implementation of the Agency Memo as it relates to follow-to-
 20 join refugees and refugees who are nationals of (and stateless persons who last habitually
 21 resided in) the SAO countries;

23 ⁵ The same is true of the conclusory assertion in the Department of Homeland Security’s January 29
 24 memorandum that Defendants are complying with this Court’s injunction. *See Keaney Decl.* Ex. C at 1 n.2. In light
 25 of Defendants’ representations to the Court to date, Plaintiffs cannot simply accept Defendants’ assertions of
 26 compliance without the opportunity to understand what actions are being taken.

⁶ In the opposition to the Motion to Stay Proceedings, Plaintiffs noted that they are aware of one client of
 JFS Seattle who has a travel date. Opp. to MSP at 6 n.8 (ECF No. 115). That client’s travel date, however, has been
 rescheduled twice and the client has not been permitted to travel yet.

- 1 • Documents relating to actions taken by Defendants to comply with this Court's
- 2 preliminary injunction dated December 23, 2017 and order denying Defendants' motion
- 3 for stay pending appeal (ECF No. 106);
- 4 • Documents relating to actions taken by Defendants as a result of the end of the 90-day
- 5 review for SAO countries and as a result of the implementation of the additional vetting
- 6 procedures for follow-to-join refugees; and
- 7 • Policy documents and data relating to the processing of refugee applications and
- 8 admission of refugees to the United States from October 23, 2017 to the date of
- 9 production.

10 As part of this document discovery, Plaintiffs request that the Court order production of

11 the unredacted version of the January 29, 2018 memorandum. Defendants have claimed that the

12 redaction is justified under the law enforcement privilege. *See* Keaney Decl. ¶ 6, Ex. E. As an

13 initial matter, the Ninth Circuit has yet to recognize the law enforcement privilege. *See, e.g.,*

14 *Shah v. Dep't of Justice*, 2017 WL 4812585, *1 n.1 (9th Cir. Oct. 25, 2017) (noting that the U.S.

15 Supreme Court and the Ninth Circuit have yet to recognize or reject this privilege). But even

16 assuming that the privilege exists in this circuit, it is a limited one. To invoke it, the Defendants

17 must satisfy three requirements: (1) the head of the department having control over the

18 information must make a formal claim of privilege, (2) this claim must be based on actual

19 personal consideration, and (3) Defendants must provide an explanation for why specific

20 information falls within the scope of the privilege. *See Wagafe v. Trump*, No. C17-94 RAJ, 2017

21 WL 5990134, *2 (W.D. Wash. Oct. 19, 2017) (citing *In re Sealed Case*, 856 F.2d 268, 271 (D.C.

22 Cir. 1988)). Moreover, the privilege is qualified, such that the need for the litigant to access the

23 information can outweigh the public interest in non-disclosure. *Id.* (holding that the need for

24 plaintiffs to obtain the information, weighed against the government's vague and speculative

25 reasons for withholding, favors disclosure); *see also Perez v. Guardian Roofing LLC*, No. 3:15-

26 cv-05623-RJB, 2016 WL 1408027, *3 (W.D. Wash. Apr. 11, 2016) (holding that the balance

1 weighs in favor of disclosure in the case). “When the records are both ‘relevant and essential’ to
2 the presentation of the case on the merits, ‘the need for disclosure outweighs the need for
3 secrecy,’ and the privilege is overcome.” *Hemstreet v. Duncan*, No CV-07-732-ST, 2007 WL
4 4287602, at *2 (D. Or. Dec. 4, 2007) (quoting *In re Search of Premises Known as 1182 Nassau*
5 *Averill Park Rd.*, 203 F.Supp.2d 139, 140 (N.D.N.Y. 2002)). Here, the need for Plaintiffs to
6 understand Defendants’ compliance with the injunction certainly outweighs Defendants’
7 speculative assertion that disclosure of this limited information “may lead some nefarious actors
8 to conceal information” because the redacted information is currently not public, Keaney Decl. ¶
9 6, Ex. E.

10 Plaintiffs propose to confer with Defendants on the need for additional discovery, such as
11 depositions, as appropriate after the production of the documents.

12 CONCLUSION

13 For the reasons stated above, Plaintiffs respectfully request that the Court grant this
14 motion as an alternative to proceeding as proposed in Plaintiffs’ opposition to Defendants’
15 motion to stay proceedings (ECF No. 115).

1 Respectfully submitted,

DATED: February 15, 2018

2 /s/ Lauren Watts Staniar

3 David Burman, WSBA No. 10611
 4 Lauren Watts Staniar, WSBA No. 48741
 5 Tyler Roberts, WSBA No. 52688
 6 Perkins Coie LLP
 7 1201 Third Avenue, Suite 4900
 8 Seattle, WA 98101-3099
 9 Telephone: 206.359.8000
 10 Facsimile: 206.359.9000
 11 dburman@perkinscoie.com
 12 lstaniar@perkinscoie.com
 13 troberts@perkinscoie.com

Justin B. Cox, *Pro Hac Vice*
 National Immigration Law Center
 PO Box 170208
 Atlanta, GA 30317
 Tel: (678) 279-5441
 Fax: (213) 639-3911
 cox@nilc.org

14 Mariko Hirose, *Pro Hac Vice*
 15 Deepa Alagesan, *Pro Hac Vice*
 16 Linda Evarts, *Pro Hac Vice*
 17 Kathryn C. Meyer, *Pro Hac Vice*
 18 International Refugee Assistance Project
 19 40 Rector Street, 9th Floor
 20 New York, NY 10006
 21 Tel: (646) 459-3044
 22 mhirose@refugeerights.org
 23 dalagesan@refugeerights.org
 24 levarts@refugeerights.org
 25 kmeyer@refugeerights.org
 26 Elizabeth Sweet, *Pro Hac Vice*
 Mark Hetfield, *Pro Hac Vice*
 HIAS, Inc.
 1300 Spring Street, Suite 500
 Silver Spring, MD 20910
 Tel: 301-844-7300
 liz.sweet@hias.org
 mark.hetfield@hias.org

Karen C. Tumlin, *Pro Hac Vice*
 Melissa S. Keaney, *Pro Hac Vice*
 Esther H. Sung, *Pro Hac Vice*
 National Immigration Law Center
 3450 Wilshire Blvd, #108-62
 Los Angeles, CA 90010
 Tel: (213) 639-3900
 Fax: (213) 639-3911
 tumlin@nilc.org
 keaney@nilc.org
 sung@nilc.org

Lauren E. Aguiar, *Pro Hac Vice*
 Mollie M. Kornreich, *Pro Hac Vice*
 Abigail E. Davis, *Pro Hac Vice*
 Four Times Square
 New York, NY 10036
 Tel: (212) 735-3000
 Fax: (212) 735-2000
 lauren.aguiar@probonolaw.com
 mollie.kornreich@probonolaw.com
 abigail.sheehan@probonolaw.com

Counsel for Plaintiffs Jewish Family Service, et al.

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all of the registered CM/ECF users for this case.

I hereby declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of February, 2018.

/s/ Lauren Watts Staniar
Lauren Watts Staniar, WSBA No. 48741